

NTSB Order No. EA-4161

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of April, 1994

Docket SE-13423

subject to the standards contained in 14 C.F.R. Part 43, violations of which were alleged in the complaint.²

In his petition for reconsideration the Administrator reiterates an argument already rejected by the law judge³ and by the Board on appeal.⁴ Specifically, he argues that he has the authority to revoke respondent's certificate based solely on respondent's demonstrated lack of qualifications, without reference to any regulatory violations, and that the evidence in this case showing respondent's three allegedly improper returns to service of the aircraft engine in question should have been sufficient to defeat the motion to dismiss. The Administrator contends that we failed to directly address this argument in EA-4093 and requests that we do so now.

The only petitions for reconsideration the Board will consider in emergency cases such as this one are those based on the ground that new matter has been discovered. 49 C.F.R. 821.57(d). The Administrator concedes that his petition is not based on new matter, but urges us to exercise our discretion to consider it nonetheless because the issue raised is "a significant safety issue regarding the Administrator's authority," which could impact future proceedings. (Pet. at 1.)

² The law judge relied on our decision in Administrator v. Grant, NTSB Order No. EA-3577 (1992), upholding dismissal of a similar case when the record contained no direct proof of a U.S. airworthiness certificate at the conclusion of the Administrator's case in chief. Although we affirmed the dismissal in this case, we nonetheless indicated our intention to retreat from Grant's strict evidentiary requirement in future cases.

³ On this point, the law judge stated, "if the Administrator is permitted to prove lack of qualification without proving any of the FAR violations alleged in the complaint, a complaint no longer serves the purpose of notice so as to put the respondent on notice as to what violations he must be prepared to defend against." (Edited initial decision at Tr. 892.)

⁴ Specifically, in EA-4093, at 6, we said: "we find no abuse of discretion in the law judge's rejection of the Administrator's fourth argument. Even if, as the Administrator asserts, respondent's lack of qualifications could have been established without reference to any regulatory violations, we think the law judge had no choice but to grant respondent's motion to dismiss in view of the similarities between this case and Grant. [Footnote 7:] We note that Grant was also an emergency revocation action in which the same argument regarding lack of qualifications could have been made."

While the issue of whether the Administrator may premise revocation of an airman's certificate solely on a lack of qualification without reference to any regulatory violations may indeed be a significant question, it was not directly presented in this case. This case was initiated and litigated on a complaint which alleged that respondent lacked qualification based on his violations of 14 C.F.R. 43.13(a) and (b). Under these circumstances, respondent was entitled to defend against the Administrator's action by attempting to show that he failed to prove the required elements of those violations. Having cited these regulatory violations in the complaint as the basis for the revocation, the Administrator is bound thereby and cannot subsequently ignore those allegations, which were not framed as alternative theories of accountability, because of a failure of proof on his part.⁵

In sum, we decline to depart from our rule limiting petitions for reconsideration in emergency cases to those based on new matter, in order to provide what would essentially be an advisory opinion not warranted by the pleadings in this case.⁶

ACCORDINGLY:

The Administrator's petition for reconsideration is denied.

VOGT, Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above order.

⁵ We note that at no time in this proceeding has the Administrator sought to amend his complaint so as to delete the allegations of regulatory violations.

⁶ We note, however, that our comments in EA-4093 do not necessarily foreclose the possibility that, in a future case, the Administrator might successfully prove a lack of qualification, without also proving any regulatory violations, when the complaint is not specifically premised on regulatory violations.